No. 137, Original

In the Supreme Court of the United States

STATE OF MONTANA, PLAINTIFF

v.

STATE OF WYOMING
AND
STATE OF NORTH DAKOTA

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the State of Montana's motion for leave to file a bill of complaint should be granted.

STATEMENT

The State of Montana seeks leave to commence an original action to enforce its rights under the Yellowstone River Compact (Compact). See Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 (approving and reprinting the Compact). (The text of the Compact is appended to Montana's proposed bill of complaint.) The Compact allocates the water supply of the Yellowstone River Basin among the States of Wyoming, Montana, and North Dakota. See Compact Art. V, 65 Stat. 666-668. Montana asserts that the Compact effected a full equitable divi-

sion of the waters of the Tongue and Powder Rivers, tributaries of the Yellowstone River. Compl. ¶¶ 2, 6. Based on that interpretation of the Compact, Montana alleges that Wyoming has depleted Montana's rights under that allocation by allowing various new uses of water in the Tongue and Powder River Basins. Compl. ¶¶ 9-13; Br. in Supp. of Compl. 19. Montana does not seek relief against North Dakota. Compl. ¶ 4; Br. in Supp. of Compl. 3. Wyoming responds that this Court should deny the motion because Montana has failed to state a claim under the Compact or to plead injury with sufficient particularity. See Br. in Opp. 14-17. Wyoming also argues that Montana has an alternative forum for relief in the Yellowstone River Compact Commission. *Id.* at 28-29.

1. The Yellowstone River Basin is an approximately 70,100-square-mile watershed encompassing parts of Wyoming, Montana, and North Dakota. The mainstem of the Yellowstone River rises in Yellowstone National Park, flows north out of Wyoming into Montana, crosses Montana in a northeasterly direction, and joins the Missouri River just inside the North Dakota border, approximately 700 miles from the source. The major interstate tributaries of the Yellowstone for purposes of the Yellowstone River Compact are the Clarks Fork, the Bighorn, the Tongue, and the Powder Rivers. Compact Art. II(F), 65 Stat. 665. Each of those rivers flows through both Wyoming and Montana and joins the Yellowstone River in Montana.

The rights to the waters of two of those tributaries, the Tongue and Powder Rivers, are at issue in Montana's bill of complaint. Each rises in Wyoming's Bighorn Mountains. The Tongue flows approximately 225 miles northeast to its confluence with the Yellowstone

near Miles City, Montana, and its basin covers approximately 5400 square miles. The Powder flows roughly north for approximately 500 miles and joins the Yellowstone at Terry, Montana; its basin encompasses approximately 13,200 square miles. The principal use of water diverted from both rivers is for irrigation within Wyoming and Montana. The Tongue serves as the primary water source for the Northern Cheyenne Indian Reservation, adjacent to the river in south-central Montana.[1]

The other interstate tributaries of the Yellowstone River that are subject to the Compact are the Bighorn River (except for its tributary the Little Bighorn River) and the Clarks Fork. Compact Art. II(F), 65 Stat. 665. The Bighorn River runs approximately 460 miles from its headwaters near Lander, Wyoming, to its confluence with the Yellowstone near Bighorn, Montana. The principal use of the waters diverted from that tributary in both States is for irrigation; much of the irrigation use in Wyoming is through Bureau of Reclamation projects. Bighorn Reservoir, one of several federal reservoirs in the Bighorn River Basin, straddles the state line and is surrounded by the Bighorn Canyon National Recreation Area. The Crow Reservation and the Wind River Reservation are also located in the Bighorn drainage. The 150-mile Clarks Fork rises in southern Montana, runs south into Wyoming, then turns to run northeasterly to its confluence with the Yellowstone near Laurel, Montana. Although no Compact violation is alleged regarding the Bighorn or Clarks Fork, the water rights and water administration in those river basins will be af-

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[1] Under the *Winters* doctrine, *see Winters* v. *United States*, 207 U.S. 564 (1908), the United States holds reserved water rights in trust for the Northern Cheyenne Tribe.

fected by any Compact interpretation established in this litigation.

2. In 1949, Congress authorized representatives of the States of Montana, Wyoming, and North Dakota to negotiate a compact "providing for an equitable division or apportionment between the States of the water supply of the Yellowstone River and of the streams tributary thereto." Act of June 2, 1949, ch. 166, 63 Stat. 152-153. The three States duly reached agreement on December 8, 1950, and the resulting Yellowstone River Compact was subsequently ratified by each of the state legislatures and approved by Congress in accordance with the Compact Clause of the Constitution, Art. I, § 10, Cl. 3. See Act of Oct. 30, 1951, ch. 629, 65 Stat. 663.

As Montana's brief sets out, the Compact establishes a mechanism for dividing the water supply for the Yellowstone River Basin. The preamble declares that the Compact is intended to "remove all causes of present and future controversy between said States * * * with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park." 65 Stat. 663. The preamble further states that the parties "desire[] to provide for an equitable division and apportionment of such waters," and that they acknowledge that "the great importance of water for irrigation" shall be recognized "in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin." *Ibid.*

Article II of the Compact defines relevant terms. The Yellowstone River System is defined as "the Yellowstone River and all of its tributaries, * * * from their sources to the mouth of the Yellowstone." Art. II(D), 65 Stat. 664. "Tributary" means "any stream which in a

natural state contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof." Art. II(E), 65 Stat. 664. The "Interstate Tributaries," in turn, are defined as the Tongue, Powder, Clarks Fork, and Bighorn Rivers. Art. II(F), 65 Stat. 665. The terms "[d]ivert" and "[d]iversion" are defined to mean "the taking or removing of water from the Yellowstone River or any tributary thereof." Art. II(G), 65 Stat. 665. The term "[b]eneficial [u]se" means "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Art. II(H), 65 Stat. 665.

Article III creates the Yellowstone River Compact Commission to administer the Compact as between Montana and Wyoming.[4] The Commission includes one representative of each of the two States. The Director of the United States Geological Survey (USGS) appoints a federal representative (traditionally a USGS employee), who chairs the Commission but has no vote except in case of disagreement between Montana and Wyoming on a "matter necessary to the proper administration of this Compact." Art. III(F), 65 Stat. 665. The Commission's jurisdiction includes the "collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact, and recommendations to [the signatory] States upon matters connected to the administration of this Compact." Art. III(C), 65 Stat. 665. The Commission also has the power to formulate rules and regulations necessary to carry out the provisions of the Compact. Art. III(E), 65 Stat. 666.

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[4] The Commission does not administer the Compact as between Montana and North Dakota. Art. III(A), 65 Stat. 665.

The operative provision, Article V, provides for the division of water between Montana and Wyoming according to a three-tiered framework, as the two States agree in their briefs. Br. in Supp. of Compl. 11-14; Br. in Opp. 2. Article V(A) sets out the first tier: it provides that "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." 65 Stat. 666. The latter doctrine provides that a person who diverts water and puts it to a beneficial use retains the right to that water, on a "first in time, first in right" basis, although only to the extent the water is reasonably required and actually used. See, *e.g.*, *Arizona* v. *California*, 298 U.S. 558, 565-566 (1936).

Article V(B) sets out the second and third tiers. 65 Stat. 666. Of the water that is "unused and unappropriated" as of January 1, 1950, the second-tier allocation gives each State the quantity necessary to provide supplemental water supplies for the first-tier rights. Those supplemental rights, too, are to be acquired pursuant to the doctrine of appropriation. *Ibid.* Once those supplemental rights are satisfied, the third-tier allocation divides any remaining "unused and unappropriated" water between the two States, according to a formula recomputed each water year, with each State receiving a specified percentage of the water of each of the four interstate tributaries. Art. V(B), 65 Stat. 666-667.

The controversy here relates principally to Article V's operative provisions. Articles VI through XI of the Compact appear not to be implicated in the parties' dispute.

3. Montana alleges that Wyoming has increased its use of water from the Powder and Tongue Rivers in several respects since January 1, 1950. First, Montana asserts that fifteen reservoirs have been built in the Wyoming portion of the Powder and Tongue basins since January 1, 1950, increasing storage capacity by approximately 225,400 acre-feet. Compl. ¶ 9; Br. in Supp. of Compl. 14. Second, Montana alleges that new acreage has been put under irrigation in the Wyoming portion of the Powder and Tongue basins. Compl. ¶ 10; Br. in Supp. of Compl. 14. Third, Montana alleges that Wyoming has allowed the construction and use of groundwater wells for irrigation and other uses, including coalbed methane production. Compl. ¶ 11; Br. in Supp. of Compl. 15. Fourth, Montana alleges that Wyoming water users have increased their consumption on existing acreage by implementing new, more water-intensive irrigation methods that reduce the amount of water used for irrigation that makes its way back to the stream. Compl. ¶ 12; Br. in Supp. of Compl. 15-16.

Montana does not allege that Wyoming has violated the Compact merely by allowing these activities. Instead, Montana argues that, as a result of them, it has received insufficient water to satisfy its own rights under the Compact's first-tier allocation, and that Wyoming therefore has violated the Compact by permitting the aforementioned increases in water use while failing to curtail the diversion of water as necessary to protect Montana's rights under the Compact. Compl. ¶¶ 14-16; Br. in Supp. of Compl. 14. The gravamen of Montana's complaint is that in some recent years, there has been insufficient water available in the Powder and Tongue Rivers to satisfy pre-1950 water rights in Montana under the Compact's first tier, see Br. in Supp. of Compl.

17, and that when Montana's first-tier rights are not satisfied there is no "unused and unappropriated" water to be allocated between the States pursuant to the Compact's second and third tiers.[3]

Wyoming asserts that Montana has not established a ripe Compact violation. In Wyoming's view, Montana has not adequately alleged any cognizable injury from Wyoming's use of water. See Br. in Opp. 17, 22-23, 24 (asserting that Montana's groundwater, storage, and increased irrigation claims are unripe). Wyoming also asserts that any increases in water consumption in the Wyoming portion of the Yellowstone River Basin have been permissible under the Compact as Wyoming construes it. See, *e.g.*, *id.* at 15-16 (asserting that the Compact does not cover groundwater); *id.* at 18-19 (stating that increased consumption of water cannot be a Compact violation); *id.* at 21 (stating that the reservoirs identified in Montana's storage claim are not covered by the Compact because they are located on tributaries of the Powder and Tongue, not the mainstems of those rivers).

It appears that, on Montana's own theory, to prevail Montana must establish one or more of the following propositions: that the Compact protects Montana's

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[3] If Montana's allegations are correct, Wyoming's actions might also have affected the rights of the Northern Cheyenne Tribe to waters from the Tongue, which under a compact between Montana and the Tribe (approved by Congress) have a priority date of October 1, 1881. See Mont. Code Ann. § 85-20-301 art. II(A)(2)(a) (2005); see also Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. No. 102-374, § 4(a), 106 Stat. 1187; Compact Art. VI, 65 Stat. 668 ("Nothing contained in this Compact shall * * * affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.").

first-tier rights from infringement by holders of rights under the lower tiers of the Compact; that the Compact requires Wyoming to limit its lower-tier water usage if Montana's first-tier rights are not satisfied; that the Compact limits groundwater pumping if its effect is to deplete the Yellowstone River system of water needed to satisfy Montana's first-tier rights; that the storage of water on tributaries of the Powder and Tongue Rivers under post-Compact water rights must be included in the Compact accounting, and may not deplete flows needed by pre-1950 water rights in Montana; and that the expansion of irrigation and the use of more consumptive irrigation techniques that diminish return flows may violate the Compact if they result in Montana's receiving insufficient water to satisfy its first-tier rights. Montana must also establish a factual predicate for its claim that its asserted rights under the Compact have been violated—*e.g.*, that "in 2004 and again in 2006, Montana experienced severe water shortages in the Tongue and Powder River Basins," and that as a result "Montana's pre-1950 uses were unsatisfied due to shortages at the stateline." Br. in Supp. of Compl. 17.

The States have disputed some of these issues for many years. See Br. in Supp. of Compl. 16-17 (citing disputes going back to 1983). Most recently, in December 2006, the Montana representative to the Compact Commission proposed a resolution adopting Montana's interpretation of the Compact on a number of these disputed points; the Wyoming representative disagreed. See *id.* at 18; Br. in Supp. of Compl. App. A3-A5.

DISCUSSION

The United States suggests that Montana should be granted leave to file its Bill of Complaint. Montana al-

leges an interstate dispute of sufficient importance to warrant this Court's exercise of its original jurisdiction, and there is no other forum in which the controversy practicably can be resolved. Wyoming's challenges to the complaint's legal sufficiency turn on the interpretation of the Compact, and therefore should properly be resolved on their merits; at this threshold stage, Montana has adequately pleaded an injury to its sovereign rights, under its interpretation of the Compact. The United States additionally suggests that this Court may wish to consider potentially dispositive legal issues before referring the matter to a Special Master or taking other action. The resolution of those legal issues, which could be placed before the Court through a motion to dismiss the complaint, could significantly facilitate disposition of the controversy.

I. MONTANA'S BILL OF COMPLAINT ALLEGES A CONTROVERSY THAT WARRANTS THE EXERCISE OF THE COURT'S ORIGINAL JURISDICTION

This Court has original and exclusive jurisdiction over a justiciable case or controversy between States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a). That jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983); see, *e.g.*, *New Jersey* v. *New York*, 523 U.S. 767 (1998); *Kansas* v. *Colorado*, 514 U.S. 673 (1995); *Virginia* v. *West Virginia*, 206 U.S. 290, 317-319 (1907). The Court has determined that its exercise of this exclusive jurisdiction is "obligatory only in appropriate cases." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972)); see *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995);

Texas v. *New Mexico*, 462 U.S. at 570. In deciding whether to grant leave to file a complaint in a dispute arising under the Court's exclusive original jurisdiction, the Court examines "the nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (citations omitted). The Court also considers "the availability of an alternative forum in which the issue tendered can be resolved." *Ibid.* Under those standards, Montana's complaint presents a controversy warranting the exercise of original jurisdiction.

A. Montana's Claim Of A Breach Of An Interstate Water Compact Asserts A Substantial Sovereign Interest

In claiming that Wyoming is depriving it of its lawful share of the water of an interstate stream, Montana asserts a substantial sovereign interest that falls squarely within the traditional scope of this Court's original jurisdiction. See, *e.g.*, *Texas* v. *New Mexico*, 462 U.S. at 567-568; *Arizona* v. *California*, 373 U.S. 546 (1963); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Wyoming* v. *Colorado*, 298 U.S. 573 (1936); *Kansas* v. *Colorado*, 185 U.S. 125 (1902). This Court has recognized that compacts are federal law; that the compact process affords States an amicable alternative to direct litigation in this Court over fact-specific issues, such as the fairest and most just apportionment of water resources; and that disputes concerning the interpretation of compacts therefore are entirely proper for this Court to resolve. The nature of Montana's claims regarding the Yellowstone River therefore appears to be of sufficient "seriousness and dignity," *Mississippi* v. *Louisiana*, 506 U.S. at 77 (quoting *Illinois* v. *City of Milwaukee*, 406

U.S. at 93), to support the exercise of the Court's jurisdiction.

B. The Compact Commission Is Not A Viable Alternative Forum

Contrary to Wyoming's assertion (Br. in Opp. 28-29), the jurisdiction of the Compact Commission does not warrant this Court's staying its hand and denying Montana's motion for leave to file its bill of complaint. Indeed, Wyoming does not argue that the Commission has the authority to render binding interpretations of the Compact and thereby to resolve the dispute between the two States over its construction. Rather, relying on Article III(C), which gives the Compact Commission jurisdiction to collect, correlate and present factual data and maintain records bearing on administration of the Compact, Wyoming asserts that the Commission is the proper forum for developing the *factual* particulars that Wyoming contends Montana needs in order to plead cognizable claims. In Wyoming's view, full development of the facts will show that Montana has not suffered invasion of its protected interests.

Wyoming's argument would invert the customary course of proceedings. The prospect that a claim will fail on the merits is not customarily a reason to reject it at the threshold. Here, moreover, Wyoming does not contend that proceeding before the Compact Commission should be required as a form of exhaustion, or that the Compact Commission has the authority to grant Montana effective relief that might eliminate the need to proceed in a judicial forum. See *Maryland* v. *Louisiana*, 451 U.S. 725, 743 n.19 (1981) (noting that an action in state court was not a viable alternative to proceeding with an original action, because the proposed alternative forum lacked authority to grant full relief). And, even

as to fact-gathering, Montana cannot invoke the assistance of the Commission as a matter of right. New undertakings by the Commission would require the concurrence of the Wyoming representative—or, failing that, the casting of a tie-breaking vote by the representative of the United States (see p. 5, *supra*), a course that the federal government has heretofore eschewed.

Resolving the parties' legal dispute over the interpretation of the Compact will necessarily establish, and potentially narrow, the scope of relevant facts to be determined. If this Court determines that the action should proceed and that fact-finding is appropriate, any Special Master appointed by the Court would have the discretion to structure fact-finding to make full use of the Commission's data and expertise as at least a partial alternative to requiring the parties to engage in traditional discovery.

C. Montana's Complaint Adequately Alleges Injury

Although Montana's assertion of injury lacks detail, it appears to be adequate to state a ripe claim. Montana alleges that in low-water years, and as a result of Wyoming's asserted Compact violations, an insufficient quantity of water has crossed the state line to satisfy its first-tier water rights. Those allegations of past incidents state a cognizable claim of failure to perform under the Compact, which in similar cases has been held to be a sufficient injury to warrant retrospective relief—either money damages or repayment in water. See *Texas* v. *New Mexico*, 482 U.S. 124, 129 (1987). Neither that assertion nor Montana's claim that the dispute is an ongoing one, likely to recur, is facially implausible. Cf. *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1966-1968 (2007) (alluding to the "plausibility standard" that even

notice pleading must meet). Drought in the Western States, including the Yellowstone River Basin, is a relatively regular occurrence.[4]

The pleading requirements for initiation of an original action are not clearly defined. The Federal Rules of Civil Procedure are not strictly applicable in original actions, but provide guidance for the Court's proceedings. See Sup. Ct. R. 17.2; see also, *e.g.*, *Kansas* v. *Nebraska*, 527 U.S. 1020 (1999) (order granting Nebraska leave to file a motion to dismiss "in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure"). Looking here to the Federal Rules, Montana provides the requisite "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Wyoming's objections to the generality of Montana's allegations; its assertion that the failure to plead factual allegations indicates that Montana has developed none; and its attempt to introduce documentary evidence of its own are largely beside

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[4] Montana asserts (Reply Br. 8) that its mere assertion of a Compact violation relieves it of the obligation to show any resulting injury to its individual water users from that violation. When a State complains of a violation of a decree of this Court in an original action, it need not show injury, because the violation may be remedied by contempt even if no affirmative relief to the complaining party is necessary. See *Nebraska* v. *Wyoming*, 507 U.S. 584, 592 (1993); *Wyoming* v. *Colorado*, 309 U.S. 572, 581 (1940). The Special Master in *Kansas* v. *Colorado* determined that a compact should be treated like a decree for these purposes, because the "rights and duties" that a State undertakes pursuant to a compact should not "be harder to enforce than they would be if contained in a decree of the Court." First Report of the Special Master at 69-70, *Kansas* v. *Colorado*, 514 U.S. 673 (1995) (No. 105, Original). This Court did not resolve the issue. See *Kansas* v. *Colorado*, 514 U.S. at 693-694. Because Montana pleads injury to its water users, the question need not be resolved in this case either.

the point at this threshold stage under the Federal Rules of Civil Procedure. And although this Court could establish a different pleading standard in original-jurisdiction cases, it has accepted jurisdiction in other interstate water disputes without requiring the sort of factual specificity in the complaint that Wyoming urges. See, *e.g.*, *Nebraska* v. *Wyoming*, 515 U.S. at 6, 11; Bill of Complaint, *Kansas* v. *Nebraska*, 538 U.S. 720 (2003) (No. 126, Original).

The majority of Wyoming's objections, however, are premised on the notion that Montana has failed to state any injury under a proper interpretation of the Compact. Although Wyoming appears to be correct that this case may turn on interpretation of the Compact, the question whether Montana has properly invoked this Court's jurisdiction is distinct from the question whether Montana has stated a claim.

II. BEFORE REFERRING THE MATTER TO A SPECIAL MASTER, OR TAKING OTHER ACTION, THIS COURT SHOULD RESOLVE THE THRESHOLD LEGAL ISSUES

Upon granting a motion for leave to file a complaint, the Court typically directs the defendant to file an answer, and then refers the matter to a Special Master to conduct any necessary proceedings. In appropriate situations, however, this Court has resolved preliminary or controlling legal issues before, or in lieu of, referring the case to a Master. This controversy presents a situation where that course would be appropriate.

If this action were conducted under the Federal Rules of Civil Procedure, Wyoming could move to dismiss Montana's complaint for failure to state a claim upon which relief may be granted as a matter of law. See Fed. R. Civ. P. 12(b)(6); see also, *e.g.*, 2A James

Wm. Moore, *Moore's Federal Practice* ¶12.07[2.-5] (2d ed. 1996); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1355-1356 (3d ed. 2004). Drawing on the Federal Rule as a guide, see Sup. Ct. R. 17.2, the Court may wish to invite the filing of a motion to dismiss in this case.

Two recent original actions have proceeded in this fashion, which has narrowed or even resolved the issues before appointment of a Special Master. In *New Hampshire* v. *Maine*, the defendant State was permitted to file "a motion to dismiss on res judicata grounds." 530 U.S. 1272 (2000). Maine argued that the complaint was wholly barred by res judicata, collateral estoppel, and judicial estoppel. *New Hampshire* v. *Maine*, 532 U.S. 742, 748 (2001). This Court agreed with the judicial-estoppel ground and granted the motion to dismiss New Hampshire's complaint. *Id.* at 756. See also *Wyoming* v. *Oklahoma*, 488 U.S. 921 (1988) (denying Oklahoma's motion to dismiss without referring it to a Special Master, and ordering Oklahoma to file an answer); *United States* v. *California*, 375 U.S. 927 (1963) (denying California's motion to dismiss); *United States* v. *Louisiana*, 338 U.S. 806 (1949) (overruling Louisiana's demurrer without referring it to a Special Master).

In an even more factually analogous case, the State of Kansas sought leave to file a bill of complaint based on Nebraska's allowing groundwater pumping, which Kansas alleged to violate the Republican River Compact. Nebraska disputed whether the Compact applied in any way to limit its pumping of groundwater. The Court accordingly granted Nebraska "leave to file a motion to dismiss, in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, limited to the question whether the Republican River Compact

restricts a state's consumption of groundwater." *Kansas* v. *Nebraska*, 527 U.S. at 1020. See generally U.S. Br. at 16-19, *Kansas* v. *Nebraska*, 538 U.S. 720 (No. 126, Original). The Court subsequently referred the motion to dismiss to a Special Master, and on his recommendation denied it. 528 U.S. 1001 (1999); 530 U.S. 1272 (2000).[5]

This course of action is particularly appropriate where, as here, the complaint seeks a definitive interpretation of an interstate compact. This Court's "object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented," and to that end the Court will dispose of antecedent legal questions at the earliest stage "feasible." *Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973). Here, the antecedent questions of compact interpretation are susceptible of resolution using well-established tools of construction. The Court would first examine the text of the Compact. An interstate compact is both a contract and a law of the United States. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Texas* v. *New Mexico*, 482 U.S. at 128. As with other federal laws, if the text, read in light of its context, is unambiguous, it is conclusive. See, *e.g.*, *Kansas* v. *Colorado*, 514 U.S. at 690 ("We conclude that the clear language of [the Arkan-

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[5] See also, *e.g.*, *United States* v. *Alaska*, 501 U.S. 1248 (1991) (permitting original action to proceed on stipulated facts); *United States* v. *Louisiana*, 363 U.S. 1, 12-13 (1960) ("Both sides have presented in support of their position a massive array of historical documents, of which we take judicial notice, and substantially agree that all the issues tendered can properly be disposed of on the basis of the pleadings and such documents."); *United States* v. *Louisiana*, 339 U.S. 699, 702-704 (1950) (ruling based on facts alleged in complaint and admitted in answer); *United States* v. *California*, 332 U.S. 19, 21-24 (1947) (same).

sas River Compact] refutes Colorado's legal challenge."); see also *Texas* v. *New Mexico*, 462 U.S. at 567-568 ("[O]ur first and last order of business is interpreting the compact."); *New Jersey* v. *New York*, 523 U.S. at 781-785; *Central R.R.* v. *Jersey City*, 209 U.S. 473, 478-479 (1908). If the Court finds the text ambiguous, it may also consider other reliable documentary indicia of the parties' intent, including materials submitted to Congress in support of congressional approval. See *Oklahoma* v. *New Mexico*, 501 U.S. at 235 n.5; *Texas* v. *New Mexico*, 462 U.S. at 568 n.14; *Arizona* v. *California*, 292 U.S. 341, 359-360 (1934). In appropriate circumstances the Court may also take judicial notice of historical documents bearing on the dispute. See, *e.g.*, *United States* v. *Louisiana*, 363 U.S. 1, 12-13 (1960). And to the extent the parties' practical construction of the Compact bears on its meaning, see *New Jersey* v. *New York*, 523 U.S. at 830-831 (Scalia, J., dissenting) (collecting cases); cf. *Nebraska* v. *Wyoming*, 507 U.S. 584, 592 (1993) (parties' course of conduct may be relevant in interpreting decree), the Court could also consider appropriate documentation, such as the Compact Commission's annual reports.[6]

In addition, an interstate water dispute of this type is particularly likely to benefit from an early judicial determination narrowing or even resolving the contested legal issues before the parties engage in fact de-

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[6] Although a motion to dismiss may become somewhat more complex if it relies on materials extrinsic to the compact itself, this Court has commonly accepted and relied on some such materials in treaty cases. See, *e.g.*, *Air France* v. *Saks*, 470 U.S. 392, 396 (1985). And the Court always retains the option of appointing a Special Master to assist in resolving the motion to dismiss. See, *e.g.*, *Kansas* v. *Nebraska*, 528 U.S. at 1001.

velopment. Cf. *Twombly*, 127 S. Ct. at 1967 (noting the expense involved in proceeding past the pleading stage to discovery); *Ohio* v. *Kentucky*, 410 U.S. at 644 ("[I]n original cases," this Court will, "where feasible, * * * dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear."). Interstate water disputes pose complex trial-management problems once they proceed past the pleading stage. Cf. *Nebraska* v. *Wyoming*, 515 U.S. at 8-9. The factual issues involved in such disputes implicate complex principles of hydrology, geology, engineering, and economics, which must be applied with respect to great expanses of varied terrain and land and water uses. Discovery, trial preparation, and trial concerning such issues tend to be very complicated, time-consuming, and expensive. See, *e.g.*, First Report of the Special Master (four volumes), *Kansas* v. *Colorado*, 514 U.S. 673 (1995) (No. 105, Original).

Consequently, the United States suggests that the Court grant Montana leave to file its complaint, and simultaneously grant Wyoming leave to file a motion, in the nature of a motion under Rule 12(b)(6), with respect to the issues of compact interpretation that Wyoming deems dispositive. Because the Federal Rules of Civil Procedure are merely guidance for the Court in original actions, the Court may tailor procedures to facilitate its decision-making process. See *United States* v. *Alaska*, 501 U.S. 1248 (1991); *United States* v. *Alaska*, 501 U.S. 1275 (1991). If the Court decides to grant Wyoming leave to file a motion to dismiss, the United States suggests that the Court may wish to set a schedule for the motion and supporting brief, opposition, and reply, and to impose appropriate page limits for the briefs. Furthermore, because the Court's rules do not expressly

permit the filing of a brief as amicus curiae in support of or in opposition to a motion to dismiss, the Court may wish to grant prospective amici leave to file such briefs within a reasonable time after the motion is filed. Cf. Sup. Ct. R. 37.2(a) (brief as amicus curiae in support of a motion for leave to file a bill of complaint to be filed within 60 days after the motion is filed).

CONCLUSION

The motion of the State of Montana for leave to file a bill of complaint should be granted. The Court may wish to grant the State of Wyoming leave to file a motion to dismiss, in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted.

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